JAN 28 1954
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1953
No. 553

347 U.
SWA-T
43

IONE L. DRESDEN SWAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California, Motions for Leave to File and to Extend Time for Service of Record and Supporting Brief.

L. H. PHILIPS,
610 South Broadway,
Los Angeles 14, California,
Counsel for Petitioner.

OWEN J. BRADY,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Petition for writ of certiorari to the Supreme Court of the State of California 1

Summary of the matter 1

Basis of jurisdiction 3

Questions presented by this petition 4

Reasons relied upon for the allowance of this writ 5

Conclusion 5

Motion for leave to file the record in partly typewritten and partly printed form, pending determination of whether or not a writ of certiorari shall issue 7

Motion to extend time for service of printed record upon counsel for respondent 9

Supporting brief 11

I.

Due process has been denied by the limiting of the issues in the trial court 11

II.

Was the right to free speech abridged by the limiting of the issues? 15

III.

Petitioner's dismissal was an illegal act 18

Summation 19

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Betts v. Brady, 316 U. S. 455	12
Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U. S. 226	13
Douglas, et al. v. City of Jeanette, 319 U. S. 157	13
Green v. Frazier, 253 U. S. 233	11
Scott v. McNeal, 154 U. S. 34	12
Thomas v. Collins, 323 U. S. 516	19
Thornhill v. Alabama, 310 U. S. 88	19
Wieman v. Updegraff, 344 U. S. 183	16, 17

STATUTES

Act of February 13, 1925, Chap. 229 (43 Stats. 936)	3
California Education Code, Secs. 13521-13559	2, 12
Revised Rules of the United States Supreme Court, Rule 38(3)	9
United States Constitution, Fourteenth Amendment	12
United States Judicial Code, Sec. 237(b)	3

IN THE

Supreme Court of the United States

October Term, 1953.

No. .....

IONE L. DRESDEN SWAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above-entitled case on November 3, 1953.

Summary of the Matter.

On May 25, 1951, respondent Board of Education of the City of Los Angeles, hereafter referred to as the "School Board," filed in the Superior Court of the State of California, in and for the County of Los Angeles, a complaint, alleging that the defendant therein, your petitioner, should be discharged as a teacher in the public schools of Los Angeles because of certain acts she had

allegedly committed, in violation of various School Board regulations, and of state law [Clk. Tr. p. 1]. This action was brought under the Teachers' Tenure Statute of the State of California, which is found in California Education Code, Sections 13521 to 13559, inclusive.

The petitioner's answer consisted of a general denial, followed by the assertion of three separate defenses [Clk. Tr. p. 7]. These defenses, in essence, alleged that the charges set forth in the complaint were a sham and a pretext, and that the real reason for the School Board's action was to intimidate petitioner and to punish her for having exposed certain conduct of members of the School Board to the local Grand Jury and to the public at large [Clk. Tr. pp. 9-10]; and that the School Board's attempt to discharge petitioner was "calculated to deprive defendant of her constitutional rights to freedom of speech" [Clk. Tr. p. 11, lines 18-19].

(Thus, free speech was raised in the first instance.)

The School Board having demurred to the special defenses, the trial court upheld the demurrer, *without leave to amend* [Clk. Tr. p. 18].

(It is this ruling, challenged thereafter, but always sustained, which petitioner alleges constituted a denial of due process.)

Trial was thereafter had, on the pleadings as allowed, and judgment was rendered that the School Board could dismiss petitioner. [Memorandum of Decision and Judgment is at p. 32, Clk. Tr.]

Thereafter, petitioner applied to the District Court of Appeal, and thence to the Supreme Court. In both instances, the trial court was upheld, and petitions for rehearing were denied by each court.

Basis of Jurisdiction.

This court has jurisdiction to review the judgment in question under the statutory authority of Section 237(b), Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 43 Statutes 936.

A final judgment has been rendered and a rehearing denied by the highest court of the State of California, the Supreme Court. This case involves two constitutional questions, that of free speech and that of due process. Each of these grounds was urged below by the petitioner.

The question of free speech was raised in the trial court by pleading (as described in the above summary). By sustaining without leave to amend the School Board's demurrer, the trial court deleted from the pleadings all questions of whether or not the School Board's dismissal action was in fact a punishment of petitioner for having exercised her right of free speech.

Detailed references to the Reporter's Transcript can and will be supplied, should this writ be granted, on argument and by augmentation of the record; but petitioner asserts here that throughout the trial, in numerous instances, she attempted to raise issues, and argued, that these constitutional rights were being denied. These rights, *i. e.,* free speech and due process, were asserted in the intermediate court, and finally in the Supreme Court. It may be noted that the Supreme Court's opinion, at page 1, recognizes petitioner's assertion that error had been committed in the striking of her special defenses; and at page 14 thereof, the court discusses (and briefly dismisses) her arguments with reference to free speech.

Furthermore, the Petition for Rehearing in the Supreme Court, in the record here, is confined in argument to these two points.

Questions Presented by This Petition.

I.

Is the due process of law adequately preserved when a school teacher, sought to be discharged under a teachers tenure statute, is forbidden by the trial court from inquiring into the motivations of his superiors, and forbidden by the trial court from opening issues of fact which might, by their nature, expose acts or conspiracy or both, on the part of the government body employing, which by themselves inevitably tend to deprive such public employee of his right to freedom of speech?

II.

Where a local statute provides the exclusive grounds for the dismissal of a public employee, and restricted court procedure for the trial of such grounds, must the courts allow as a defense in such trial that the dismissal is in fact a punishment of the employee for having exercised his right to free speech, by testifying to a Grand Jury and by speaking publicly concerning acts of Board members?

III.

Does a local School Board act in violation of the Federal Constitution when, from motives repugnant to the Constitution, the members or a majority of the members of such body institute and prosecute proceedings to dismiss an employee, although such proceedings may, on their face, conform to a statutory procedure?

Reasons Relied Upon for the Allowance of This Writ.

1. The decision of the California Supreme Court upholds the principle that so long as the School Board acted within the framework of a local statute providing grounds for dismissal of public school teachers (and mechanics for asserting and trying those grounds), its action cannot be questioned.

This decision ignores completely the place in such a proceeding of constitutional questions. It deletes from the record, and prevents the making of any record which might show the illegality under the Federal Constitution, of the local School Board's action.

Conclusion.

For the foregoing reasons, and upon the foregoing bases, it is respectively urged that a writ of certiorari should issue from this court to the Supreme Court of the State of California.

Respectfully submitted,

L. H. PHILIPS,
Counsel for Ione L. Dresden Swan, Petitioner.

OWEN J. BRADY,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1953.

No. .....

IONE L. DRESDEN SWAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

Motion for Leave to File the Record in Partly Typewritten and Partly Printed Form, Pending Determination of Whether or Not a Writ of Certiorari Shall Issue.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes L. H. Philips, and respectfully moves this Court for leave to file the record below in partly typewritten and partly printed form, as certified by the Clerk of the Supreme Court of the State of California, pending determination of whether or not a writ of certiorari shall issue, for the following reasons:

The instant case involves the dismissal of petitioner as a school teacher. This dismissal became effective, for all practical purposes in April, 1951. The petitioner's

sole source of income was then from her wages as a school teacher.

Since April, 1951, petitioner has been employed part time only, in low paying positions, and is barely able to sustain herself in the ordinary necessaries of life.

Friends have given and loaned to her, her necessary costs for the defense of this action, from time to time, but she does not now have the means to pay or give security for the costs of printing the record and still be able to provide herself with the necessaries.

Petitioner is informed and believes that should this court grant the writ sought herein, her friends would gladly loan and give to her sufficient monies to have the record printed forthwith.

Petitioner believes she might propertly qualify to move this court *in forma pauperis,* for permission to file the above petition in typewritten form but has stretched every means available to her to avoid inconveniencing the court to that extent.

Respectfully submitted,

L. H. PHILIPS,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

IONE L. DRESDEN SWAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

Motion to Extend Time for Service of Printed Record Upon Counsel for Respondent.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes L. H. Philips and respectfully moves this court or any justice hereof for an extension of time, under paragraph 3 of Rule 38 of the Revised Rules of this court, in which to serve upon counsel for respondent the printed record, upon the following grounds:

Petitioner has in an immediately preceding motion, requested this court for leave to file and docket the record in partly typewritten and partly printed form, pending determination of whether or not a writ of certiorari may issue. Until such motion is determined, the record will

not be printed, and hence could not be served upon opposing counsel.

Should the motion be granted, the record will not be ordered to be printed until such time as the writ is either allowed or denied; and it would therefore be impossible, practically speaking, to serve a printed record until one day after receipt by moving counsel of a copy of the printed record from the clerk of this court.

Should the motion be denied, it is unlikely that moving counsel shall receive from the clerk of this court a copy of the printed record within ten days from the docketing of this petition for writ of certiorari.

It is therefore prayed that petitioner be allowed until one day after she has received from the clerk of this court a copy or copies of the printed record to serve such printed record upon counsel for the respondent.

Respectfully submitted,

L. H. PHILIPS,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

IONE L. DRESDEN SWAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

SUPPORTING BRIEF.

I.

Due Process Has Been Denied by the Limiting of the Issues in the Trial Court.

> "What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise."
>
> *Green v. Frazier,* 253 U. S. 233, at 238.

In view of the above stated doctrine, which has indeed been the prevailing philosophy of this court, this case must be judged on its own merits.

This court is concerned with whether or not the basic justice and fairness required to be exercised by all state

authorities has been followed in dealing with petitioner below.

The prohibition of the Fourteenth Amendment against depriving any person of life, liberty or property without due process of law, extends to all acts of the state, whether through its legislative, its executive or its judicial authorities. (*Scott v. McNeal,* 154 U. S. 34.) Petitioner here has a property interest in her position as a public school teacher under the Teachers' Tenure Statute (California Education Code, Secs. 13521 to 13559) which this action has taken from her.

Petitioner is in an anomalous position on appeal. Other than naked allegations in her answers to the complaint, followed by oral assertions of her counsel at trial, and then by written assertions upon appeal, the record does not disclose to any clear extent whether there is merit to her claims, and whether they could be proved upon a full trial thereof. She is not, for instance in the position of one appealing from adverse rulings during a trial. Her chief appeal is from the ruling of the trial court upon the pleadings themselves, which, at that point so closed off the issues that she was thereafter barred from making a record.

However, this very fact must not militate against her. The record is sufficient to show that from the opening of the case below, petitioner has never been granted a reasonable opportunity, or any opportunity to present her case. This is surely "shocking to the universal sense of justice," and has denied to petitioner that which is "essential to the substance of a hearing." (*Betts v. Brady,* 316 U. S. 455, at 475.)

Certainly, a reading of petitioner's answer and special defenses [Clk. Tr. pp. 7 to 11], brief though it is, will satisfy this court that either upon the adduction of proof of those answers, or at least by allowing petitioner to amend her answer (for lack of particularity), and thereafter to proceed with proof, the complexion of the trial, and the judge's decision would very possibly have been different.

In this respect, language from *Douglas, et al. v. City of Jeanette,* 319 U. S. 157, at page 162, is pertinent:

> "Allegations of fact sufficient to show deprivation of the right to free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgement of the right is effected under color of a state statute or ordinance."

Petitioner's pleadings assert that she can prove that in voting to dismiss her the members of the School Board had only one motive—to punish her for having testified to the Grand Jury, and having spoken publicly as to their conduct in office. She alleges a conspiracy to punish her; and states that the grounds set forth by the School Board are sham, and a pretext.

If proof were allowed of those statements, they would be pertinent indeed to the preservation of petitioner's constitutional rights, and the upholding of justice.

Seven members of this court concurred, in 1896, in the opinion and decision of Mr. Justice Harlan, in *Chicago, Burlington and Quincy Railroad Company v. Chicago,* 166 U. S. 226. That case related to the condemnation of

certain railroad property under a statute. This statute made no provision for an answer by the defendants. The railroad company therefore was unable to make a factual record, and came before this court upon the record showing motions by it, and arguments of counsel only. At page 234 the court says: A state's "judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that [the Fourteenth] amendment . . . regard must be had to substance and not to form." The court then overruled the Illinois courts, holding that the statute did not provide due process, despite its careful particularity to each procedural step.

The California Teachers Tenure Statute is very similar. On its face, it allows the defendant to file an answer. However, the trial and appellate courts then held that such an answer must be limited to a specific denial of the charges of the complaint. Affirmative or special defenses are not germane. In plain language, the Board of Education can phrase the charges in any manner they deem fit, and the teacher is required to answer "Yes" or "No." It is not too far fetched to say that such rulings remind one of the witness who was told to answer "Yes" or "No" to every question, and then counsel asked, "Have you stopped beating your wife?" It is sometimes impossible to reply with a direct "Yes" or "No," in fairness to oneself.

II.

Was the Right to Free Speech Abridged by the Limiting of the Issues?

The petitioner here testified to the local Grand Jury concerning conduct of School Board members. Two days later she was called into a private meeting with the Board, not being allowed friend or counsel, and was in so many words told that she must deliver to the members of the Board all the evidence she had given or related to the Grand Jury, and that *if she failed to do* so within twenty-four hours, she would be dismissed from her position.

She was not told that her work had been unsatisfactory, or that as a principal she had broken certain regulations—the entire meeting was confined to a discussion of what she had and had not told the grand jury, and that she was a disgrace to the school system, and that she would be discharged if she did not thereafter do as the School Board members told her. Reference in that meeting was made to the newspaper stories carried regarding petitioner's Grand Jury testimony, and a board member stated that now they could go to the press and tell their story, and contradict and discredit Mrs. Swan.

The minutes of that meeting are now a public record in the Los Angeles School Board's files, having been made such some two months after the trial of this case below.

It must be obvious that not only was her right to speak impaired, but that her very right to testify before a duly constituted grand jury was questioned, and denied!

If this was not interfering with free speech, then what can be?

There is some judicial expression that "a public employee may have a constitutional right to freedom of

speech, but does not have a constitutional right to be a policeman" (or as the case may be). Your petitioner respectfully asserts that this expression has been accepted because of its appealing grammar and brevity; but that it is wholly false. Public employees have the same rights as private ones. A governmental body cannot lawfully impose upon its employee a restriction that deprives that employee of his constitutional rights. It could not impose a restriction that the employee waives his immunity from search and seizure without warrant. It cannot impose a qualification that he must practice or believe in a certain religious dogma or congregation. It cannot impose a restriction that the employee may read only certain newspapers, or go to certain places.

The constitution itself has been defined and limited to such an extent that the public body is well protected without these restrictions on its employees.

A teacher may be discharged if he commits indecent exposure in public. A policeman may be discharged if he takes a paint brush and paints insults to the mayor across the face of town hall. Decency, respect for public property, respect for the public health and welfare—these are conditions which hedge in the exercise of our constitutional rights, whether by public employees or by attorneys.

But no state statute, and no local school board may restrict the *proper* exercise of a constitutional right by its employee.

A pertinent expression of this may be found in *Wieman v. Updegraff*, 344 U. S. 183, at 193 (quoting Mr. Justice Black, with whom concurred Mr. Justice Douglas):

> "Governments need and have ample power to punish treasonable acts. But it does not follow that they

must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of . . . silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven . . . It seems self-evident that all speech criticizing government rulers and challenging current beliefs may be dangerous to the *status quo*. . . . Individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest . . ."

At page 196 of the cited case (*Wieman v. Updegraff*, 344 U. S. 183) appears the following language, so apt to the case at hand:

> "To regard teachers . . . as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone makes for responsible citizens . . ."

If, therefore, as the facts (and excluded but asserted facts) in the instant case show, a teacher is dismissed because she exposed to the grand jury and the public the malfeasances of her superiors, must this court, the bulwark of the constitution, sit by and allow a state statute to be interpreted in such a manner that she is deprived of all opportunity to assert a defense resting upon her exercise of free speech?

III.

Petitioner's Dismissal Was an Illegal Act.

By posing the third question, we mean to assert that, just as the rules of agency will excuse the principal for certain of his agent's acts, when done beyond the scope of the agent's authority—so, also, when a public body commits an act which is illegal, that act is null and void, and cannot be taken as being the act of that body.

Where it can be shown that a member of a public body, as an individual, used his ballot to protect himself, personally, from possible criminal action, or where he uses his ballot deliberately to punish an employee for having exercised his constitutional rights in a manner that threatens the Board member's "job security," then how can we allow that vote to be counted? How can we allow the courts to fall into the trap of saying that the "discretion" of a governmental body will not be examined by the courts, and close the book on the case?

We have allowed principals to be excused for unauthorized acts of their agents. We have allowed corporations, in certain cases, to disaffirm the acts of their officers, why can we not therefore, following the same reasoning, assert that when a governmental body, either as a unit, or by virtue of the act of the majority of the individuals composing that body, takes an action which by its very nature infringes upon the constitutional rights of an individual in its employ, that act is void.

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. (Citing cases.)" This

language is quoted from *Thornhill v. Alabama,* 310 U. S. 88, page 102, and could very well be applied to this case. When free speech is limited in matters of public concern, we draw a curtain over the eyes of the public; if the public is darkened, government by the people will be an empty phrase.

An urgent warning was sounded in the matter of *Thomas v. Collins,* 323 U. S. 516 at 536:

> "So far as free speech is concerned, there can be no ban or burden or restriction placed on the use of such a word except on the showing of exceptional circumstances where the public safety, morality or health is involved or some other substantial interest of the community is at stake."

Summation.

There is a very practical reason, founded in law, why the protective mantle of the constitution must be allowed to public employees. That reason lies in the complexity of government.

Whether aided and abetted by self-seeking bureaucrats, or not, the very nature of our federal, state and local governments, in this society and in these times, is to grow—like a healing mold, or like a destructive cancer. But grow it will. Public employees are now numbered in the many millions.

But, if public employees run the threat of dismissal for criticizing their superiors, the best, most accurate avenue of public information concerning the doings of our governments is shut off. We, the public, will be limited to press reports, and to what facts an occasional enterprising

newsman may gather (possibly by illegal means). Other than this, we shall have no real facts on which to appraise our government.

It is respectfully asserted, therefore, that the court below erred, and that a grave question is properly brought before this court for review, and that a writ of certiorari should issue.

Respectfully submitted,

L. H. PHILIPS,
Counsel for Petitioner.

OWEN J. BRADY,
Of Counsel for Petitioner.

2

No. 553

FILED
MAR 8 1954
HAROLD B. WILLEY, Cl

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

IONE L. DRESDEN SWAN,
Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HAROLD W. KENNEDY, County Counsel
WM. E. LAMOREAUX, Deputy County Counsel
CLARENCE H. LANGSTAFF, Deputy County Counsel
1100 Hall of Records
Los Angeles 12, California
Attorneys for Respondent.

TOPICAL INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Argument	6
Point I. The Petition for Writ of Certiorari was Not Filed Within the Time Required by Law	6
Point II. The Federal Questions are Unsubstantial	10
A. The question of due process of law is raised for the first time in this petition	10
B. The decision below correctly follows the statutory provisions and the law	11
C. There is no question of a denial of the right of free speech	14
Point II. The Decision of the Supreme Court of California Is Supported by Adequate and Independent State Grounds	15
Conclusion	16
Appendix A	App. 1

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Board of Education v. Jewett, 21 Cal. App. 2d 64, 72 16

Bradford Electric Light Co. v. Clapper (N. H. 1931), 284 U. S. 221, 76 L. Ed. 135 7

Bunn v. Atlanta, No. 364 [317 U. S. 666, ante, 535, 63 S. Ct. 73] 9

Cheltenham & A. Sewage Co. v. Pennsylvania Pub. Utility Commission, No. 160 decided October 12, 1942, 317 U. S. 588, post, 482, 63 S. Ct. 38 8

Christal v. Police Commission, 33 Cal. App. 2d 564, 569 14

Citizens Bank v. Opperman (Ind. 1919), 249 U. S. 448, 63 L. Ed. 701 7

City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App. 2d 36, 48-49 14

Cole v. Violette, 319 U. S. 581, 87 L. Ed. 1599 9

Department of Banking State of Nebraska v. Pink, 317 U. S. 264, 87 L. Ed. 254 ..... 8, 9

Fresno City High School District v. De Caristo, 33 Cal. App. 2d 666, at page 670 12

Gorman v. Washington University, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962 8

Graziano v. Criminal Court of Cook County (Ill.), 345 U. S. 953 7

Gypsy Oil Co. v. Escoe (Okla. 1927), 275 U. S. 498, 72 L. Ed. 293 8

Page

Hanley v. Murphy, 40 Cal. 2d 572 13
Hayman v. City of Los Angeles, 17 Cal. App. 2d 674, 679 14
Market Street Railway Co. v. Railroad Commission of the State of California, 324 U. S. 548, 89 L. Ed. 1171 9
Midway School District v. Griffeath, 29 Cal. 2d 13, 16-17 12
Monahan v. Department of Water & Power, 48 Cal. 2d 746, 754 13
Monks v. Lee, No. 244 [317 U. S. 590, post, 483, 63 S. Ct. 50] 9
Neuwald v. Brock, 12 Cal. 2d 662, 675-676 13
Puget Sound Power and Light Co. v. King County, 264 U. S. 22, 25, 68 L. Ed. 541, 545 11
Sully v. American National Bank, 178 U. S. 289, 297, 44 L. Ed. 1072, 1075 11
Wick v. Superior Ct., 278 U. S. 575, 73 L. Ed. 515, 49 S. Ct. 94 8

Codes

Educational Code
Article 2, Chapter 11, Division 7 5
Section 13521 ..... 5, 11
Sections 13521 to 13560 11
Section 13522 11
Section 13523 11
Section 13529 ..... 3, 11
Section 13552 5

Page

41 Advance California Reports
Page 2 1
Page 557 (Cited A. C.) 1
Pages 560, 561 2
Page 562 15
Pages 565, 566 12
Page 567 14

Rules

Rules on Appeal, Section 24(a) 7
28 U. S. C. A., Sec. 2101(c), Rule 38(2) Revised Rules of the Supreme Court of the United States 6
Section 8 of the Act of February 13, 1925 6

Statutes

Cal. Const., Art. I, Sec. 9 14
U. S. Const. Amends. I and XIV 14
27 Cal. Jur., Section 96 et seq., p. 122 et seq. 13

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

IONE L. DRESDEN SWAN, *Petitioner,* vs. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, *Respondent.*	No. 553

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The opinion by the Supreme Court of the State of California is reported in 41 Advance California Reports 557 (cited A.C.). The denial of the petition for rehearing is reported in 41 A.C. Minutes, p. 2.

JURISDICTION

Respondent asserts the following grounds against the jurisdiction of this Court:

1. The petition was not filed within the time required by law.

2. The federal questions urged are unsubstantial.

3. The decision below rests upon adequate non-federal grounds.

QUESTION PRESENTED

Did the refusal of the State Court to permit the petitioner to plead and prove affirmative defenses going to the motive of the Board of Education constitute a denial of due process of law, or a denial of petitioner's right to freedom of speech under the United States Constitution?

STATEMENT

The petition for *certiorari* seeks review of a judgment of the Supreme Court of the State of California. The judgment of the Supreme Court was filed October 2, 1953. A petition for a rehearing was filed on October 14, 1953, and said petition was denied on October 29, 1953. The petition for writ of *certiorari* was filed in this Court on January 28, 1953. The opinion by the Supreme Court sets forth with particularity the facts on pages 560, 561 of 41 A.C. as follows:

> "For more than twenty-nine years defendant had been employed by the school district as a teacher and principal, and during the period here involved she was serving in the latter capacity

for the Wilshire Crest School in Los Angeles. On April 26, 1951, charges were formulated by plaintiff alleging that causes existed for her dismissal. Written notice of plaintiff's intention to dismiss defendant, together with copy of the charges, was served upon her. Defendant thereupon demanded a hearing and plaintiff, as authorized by statute, elected to file this action asking the court to inquire into the charges, determine whether or not they were true, and if so, whether they constituted sufficient grounds for her dismissal. (Ed. Code, sec. 13529.) The court found the following charges to be true:

(1) About March 13, 1951, before a regularly scheduled meeting of the Wilshire Crest Parent Teachers Association, defendant made derogatory statements concerning the Superintendent of Schools and criticized the Board of Education for bringing him to Los Angeles.

(2) At the same meeting defendant stated that she had been called before the Los Angeles City Board of Education and had "spit in their faces."

(3) Defendant failed and refused to report for teaching assignments on April 9, 1951, and April 23, 1951, when instructed to do so by the Superintendent of Schools acting under order of the Board of Education.

(4) During the school year 1949-50 defendant requested a teacher in her school to join a teachers' union in violation of the school district's rule.

(5) Defendant caused to be paid to the Wilshire Crest Parent Teachers Association the total

proceeds received from a carnival jointly presented by it and the student body under a permit providing for an equal division of the proceeds between the two groups; and contrary to established rules and policies, she accepted from the Parent Teachers Association nine phonographs purchased for the school from the carnival proceeds without obtaining the approval of the student body finance section of plaintiff's administrative office.

(6) Defendant failed to attend meetings called by the Superintendent of Schools and his assistants to aid school principals in their work, although such attendance was required under the school district's rules.

(7) During the school year 1950-1951 defendant dismissed each day approximately fifty children of the first and second grades a few minutes before two o'clock in the afternoon, although such practice was expressly disapproved by the Assistant Superintendent of Schools and contrary to the stated closing hour of 2:00 p.m. as provided in the prescribed rules.

(8) In February, 1950, defendant issued a written bulletin to the teachers in her school suggesting that they have duplicate classroom keys made to take home with them, in violation of the rule providing that classroom keys should be left in the principal's office.

(9) At the above-mentioned Parent Teachers Association meeting of March 13, 1951, defendant called the Superintendent of Schools and other school administrators "henchmen" and the Board

of Education Office "The Little Kremlin"; and immediately upon adjournment of the Parent Teachers Association meeting defendant permitted the persons present to assemble in a citizens meeting in her school without the necessary permit as required by plaintiff's rules regulating the holding of public meetings in school buildings.

From such findings the court concluded that there was cause for defendant's dismissal on these grounds: (1) unprofessional conduct; (2) evident unfitness for service; and (3) persistent violation of or refusal to obey the school laws of the state and reasonable regulations prescribed for the government of the public schools by the State Board of Education and by the Board of Education of the City of Los Angeles. (Ed. Code, sec. 13521.) Accordingly, judgment was entered authorizing defendant's dismissal. (Ed. Code, sec. 13552.)"

After the entry of the judgment in October 1951, the Board of Education did dismiss the petitioner.

(Note: The provisions of the Education Code of the State of California under which the proceeding for the dismissal of the petitioner was conducted are contained in Article 2, Chapter 11, Division 7 of the Education Code of the State of California, comprising Sections 13521 to 13560, inclusive. The pertinent parts thereof are set forth in Appendix A hereof.)

ARGUMENT

POINT I.

THE PETITION FOR WRIT OF CERTIORARI WAS NOT FILED WITHIN THE TIME REQUIRED BY LAW.

28 U.S.C.A. Sec. 2101(c), Rule 38(2), Revised Rules of the Supreme Court of the United States.

Respondent contends that the time within which to file the petition for *certiorari* commenced to run on October 29, 1953, and expired on January 27, 1954.

Section 2101(c), 28 U.S.C.A., provides in part as follows:

> "Any other appeal or any writ of *certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Rule 38(2) provides in part as follows:

> ". . . The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by Section 8 of the Act of February 13, 1925 (28 U.S.C.A., Sec. 2101) . . ."

Section 24(a), Rules on Appeal, adopted by the Judicial Council of the State of California, in so far as here material, provides as follows:

> "Rule 24. Decision on Appeal.
>
> "(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk. A decision of the Supreme Court becomes final 30 days after filing unless otherwise ordered prior to the expiration of said 30 day period. . . . Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification."

Applications for *certiorari* must be made within the time limited.

> *Bradford Electric Light Co. v. Clapper* (N.H. 1931), 284 U. S. 221, 76 L. Ed. 135;
> *Citizens Bank v. Opperman* (Ind. 1919), 249 U. S. 448, 63 L. Ed. 701.

Such petition will be denied when not filed within the time provided by law.

> *Graziano v. Criminal Court of Cook County* (Ill.), 345 U. S. 953.

The running of the time for a petition for *certiorari* to the highest court of a state is suspended by a petition for rehearing but begins again on denial thereof.

Gypsy Oil Co. v. Escoe (Okla. 1927), 275 U. S. 498, 72 L. Ed. 293.

In the case of *Department of Banking State of Nebraska v. Pink,* 317 U. S. 264, 87 L. Ed. 254, this Court, in considering a petition for writ of *certiorari* to the Supreme Court of the State of New York to review a judgment affirmed by the Court of Appeals of that state, denied the petition for want of jurisdiction and reviewed the matter of time within which such petition may be filed. In this connection, the court said the following at page 268:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick v. Superior Ct.,* 278 U. S. 575, 73 L. ed. 515, 49 S. Ct. 94; *Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission,* No. 160, decided October 12, 1942, 317 U. S. 588, post, 482, 63 S. Ct. 38), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court (see *Gorman v. Washington University,* 316 U. S. 98, 86 L. ed. 1300, 62 S. Ct. 962). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

"It was for this reason that we recently held that the three-months requirement had not been complied with in *Monks v. Lee,* No. 244 [317 U. S. 590, post, 483, 63 S. Ct. 50] and *Bunn v. Atlanta,* No. 364 [317 U. S. 666, ante, 535, 63 S. Ct. 73] in which cases judgments were brought here for review from the courts of California and Georgia, and in each of which a petition for rehearing is today denied. . . ."

The case of *Market Street Railway Co. v. Railroad Commission of the State of California,* 324 U. S. 548, 89 L. Ed. 1171, likewise has under consideration the date from which the right to apply for a writ of *certiorari* commenced to run under the California rules. In that case, after the decision by the Supreme Court of the State of California, the losing party filed a petition for rehearing within the thirty-day period. This petition was denied. This Court, citing *Department of Banking State of Nebraska v. Pink, supra,* and *Cole v. Violette,* 319 U. S. 581, 87 L. Ed. 1599, held that the time for filing a petition for writ of review commenced to run from the date of the denial of the petition for rehearing. In this connection, the Court said the following at page 552 of 394 U. S.:

". . . When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30-day period. If rehearing is granted, the judgment is opened, and does not

become final as a prerequisite to application for review by us until decision is rendered upon rehearing."

In the instant case, the judgment of the Supreme Court was filed on October 2, 1953, and the petition for rehearing was denied on October 29, 1953. Ninety days from said last date is January 27, 1954, and inasmuch as the petition here was not filed until January 28, 1954, it was not filed within the time prescribed by law, and *certiorari* must be denied.

POINT II.

THE FEDERAL QUESTIONS ARE UNSUBSTANTIAL

Petitioner raises the questions of a lack of due process of law and a denial of her right to free speech as the basis for this Court assuming jurisdiction. Her argument is that due process was denied and her right to free speech was violated by limiting the issues in the trial court whereby she was prohibited from pleading and proving bad motive on the part of the Board of Education in instituting the dismissal proceedings. The claimed grounds of this Court's jurisdiction are unsubstantial for the following reasons:

A. The question of due process of law is raised for the first time in this petition.

Where no evidence appears in the record that an objection was based on a particular constitutional

ground in the Superior Court or Supreme Court, it is too late to raise it in the assignment of errors in this Court.

> *Puget Sound Power and Light Co. v. King County,* 264 U. S. 22, 25, 68 L. Ed. 541, 545;
> *Sully v. American National Bank,* 178 U. S. 289, 297, 44 L. Ed. 1072, 1075.

A search of the record fails to disclose that the matter of due process of law was at any time raised and argued in the lower court. Hence, this ground, for the assumption of jurisdiction by this Court, must fall.

B. The decision below correctly follows the statutory provisions and the law.

The statutory provisions for the dismissal of teachers are contained in Sections 13521 to 13560 of the Education Code of the State of California. After providing for the causes of dismissal (Sec. 13521), the filing of written charges and notice to the employee of the governing board's intention to dismiss him unless he requests a hearing (Secs. 13522 and 13523), it is provided as follows:

> "Section 13529. RECISSION OF ACTION OR FILING COMPLAINT ON DEMAND FOR HEARING. When any employee who has been served with notice of the governing board's intention to dismiss him demands a hearing, the governing board shall have the option either (a) to rescind its action, or (b) to file a complaint in

> the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings."

In commenting on the duty of the court in such dismissal proceedings, as prescribed by this section, the court, in *Fresno City High School District v. DeCaristo,* 33 Cal. App. 2d 666, at page 670, said the following:

> "It is rather clear from the foregoing quotation that the sole duty of the court is to try the sufficiency of the written charges as made and to determine whether or not the evidence supports those written charges and justifies the dismissal of the teacher."

See, also, *Midway School District v. Griffeath,* 29 Cal. 2d 13, 16-17, to the same effect.

Thus, the issues to be tried are strictly limited and motive on the part of the governing board is totally outside the limits of the inquiry, and there was no lack of due process in the court below. In its opinion the Supreme Court properly disposed of the petitioner's contention as follows, at pages 565, 566 of 41 A.C.:

"But this is not a case where a claim of error is based upon the failure of a trial court to admit evidence of the motives of a witness for the purpose of impeachment. (27 Cal. Jur. §96 *et seq.*, p. 122 et seq.) Rather defendant claims that despite the truth of the serious charges brought against her as found by the trial court, she should have been permitted to show the alleged motives of the members of the board, regardless of whether any member became a witness on the trial, presumably upon the theory that a showing of the alleged motives would have had the effect of completely exonerating defendant from such charges. Neither reason nor authority sustains defendant's contention.

"Defendant's alleged special defenses did not concern matters which would tend to excuse the acts or omissions charged. The plaintiff board had the unquestioned legal right to institute proceedings looking toward defendant's dismissal; and it is well settled that where there is a legal right to do a particular act, the motive which prompted the act is immaterial. *(Newwald v. Brock,* 12 Cal. 2d 662, 675-676; *Monahan v. Department of Water & Power,* 48 Cal. 2d 746, 754.) Therefore an inquiry into extraneous facts to determine possible improper motives on the part of plaintiff would not be justified. The case of *Hanley v. Murphy,* 40 Cal. 2d 572, is clearly distinguishable. There the superior officer acted without regard for the prescribed civil service rules, and his alleged bad faith therefore became a material consideration in determining the aggrieved employee's rights."

C. There is no question of a denial of the right of free speech.

Petitioner's contention in this respect was likewise correctly disposed of in the opinion below at page 567 of 41 A.C., as follows:

> "Nor can defendant prevail in her claim that affirmance of her dismissal infringes upon the constitutional guarantee of her freedom of speech, in that she thereby is denied the right to criticize her superiors upon pain of losing her position. (U. S. Const., Amends. I and XIV; Cal. Const., Art. 1, §9.) One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the authorized governmental body or officer to the end that proper discipline may be maintained, and that activities among the employees may not be allowed to disrupt or impair the public service. *(Christal v. Police Commission,* 33 Cal. App. 2d 564, 569; *City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council,* 94 Cal. App. 2d 36, 48-49.) Because of this dominant public interest, the exercise of such control over the public employee is not only a right but is a duty, and in the discharge thereof a wide discretion is allowed, which will not be disturbed until the point of illegality is reached. *(Hayman v. City of Los Angeles,* 17 Cal. App. 2d 674, 679.)"

POINT III.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA IS SUPPORTED BY ADEQUATE AND INDEPENDENT STATE GROUNDS.

Of the various charges of misconduct upon which petitioner's dismissal was based and found to be true, two of them involved a failure to report for teaching assignments; six constituted violations of rules of the Board of Education; two involved the use of undignified and disgraceful language in public addresses when referring to her superior officers; and all of them constituted insubordination. These charges having been proved, they were sufficient to justify the Court in its judgment, and none of them involved the question of free speech unless free speech can be said to include the right to use abusive and vulgar language against one's superior officers without discipline.

At page 562 of 41 A. C., the Court said:

> ". . . Briefly, it need only be said that there indisputably appears to have been a long drawn-out course of conduct on the part of defendant which produced serious friction with plaintiff as the result of her insubordination, her refusal to conform to the instructions and requirements of her superiors, and her continued violation of the rules prescribed by the school district. As principal considerations, she made derogatory statements and used undignified language with reference to school administrative officers and in describing her attitude to members of plaintiff

board, she continuously disregarded rules requiring her attendance at meetings called to assist principals in their work, she patently suggested to the teachers in her school violation of the rule providing that keys to classrooms be left in the office of the principal, and she refused to accept two teaching assignments. . . .

"The refusal of a teacher to accept an assignment which the school authorities have the power to make constitutes a violation of school laws as ground for dismissal. (Citing cases.) The willful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. (Citing cases.) . . . Within these principles, it cannot be said that the charges found to be true do not warrant defendant's dismissal. (See *Board of Education v. Jewett,* 21 Cal. App. 2d 64, 72.)"

CONCLUSION

Because the petition was not filed within the time required by law, because of the unsubstantiality of the federal questions claimed to be present, and because the opinion below is based on adequate non-federal grounds, the petition should be denied.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel
WM. E. LAMOREAUX, Deputy County Counsel
CLARENCE H. LANGSTAFF, Deputy County Counsel
By HAROLD W. KENNEDY
Attorneys for Respondent.

APPENDIX A

"Section 13521. CAUSES FOR DISMISSAL. No permanent employee shall be dismissed except for one or more of the following causes:

"(a) Immoral or unprofessional conduct.

. . .

"(e) Evident unfitness for service.

. . .

"(g) Persistent violation of or refusal to obey the school laws of the State or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him."

"Section 13522. CHARGES AND NOTICE OF INTENTION TO DISCHARGE EMPLOYEE. Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause for the dismissal of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article, if it deems the action necessary, give notice to the permanent employee of its intention to dismiss him at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article."

"13529. When any employee who has been served with notice of the governing board's inten-

tion to dismiss him demands a hearing, the governing board shall have the option either (a) to rescind its action, or (b) to file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings."

"Section 13552. SAME: DISMISSAL ON JUDGMENT. If the judgment determines that the employee may be dismissed, the governing board may dismiss him upon entry of the judgment. Otherwise the employee may not be dismissed as the result of the charges or of any charges which could have been made or heard at the hearing."